SUPREME COURT, U. S.
FILED
JUL 8 1968
JOHN F. DAVIS, CLERK

No. 152

In the Supreme Court of the United States

OCTOBER TERM, 1968

TRUST COMPANY OF GEORGIA, EXECUTOR UNDER THE WILL OF CARLING DINKLER, SR., ET AL., PETITIONERS

v.

AUBREY C. ROSS, DISTRICT DIRECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

MITCHELL ROGOVIN,
Assistant Attorney General,

HARRY BAUM,
WILLIAM A. FRIEDLANDER,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 152

TRUST COMPANY OF GEORGIA, EXECUTOR UNDER THE WILL OF CARLING DINKLER, SR., ET AL., PETITIONERS

v.

AUBREY C. ROSS, DISTRICT DIRECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The question in this case is whether an estate's consummation of a contract of sale of corporate stock entered into by the decedent resulted in (Section 691 of the Internal Revenue Code of 1954) "income in respect of a decedent" measured by the difference between the sale price and the decedent's adjusted basis in the stock, or whether the transaction should be treated as a sale by the estate, with the basis stepped up to the fair market value of the stock on the day of death.

In October 1960, the decedent, Carling Dinkler, Sr., contracted to sell his stock interest in the Dinkler-Tutwiler corporation, a member of the Dinkler Hotel chain, to Associated Hotels corporation. The purchase price of $10,000,000 was payable partly in cash and the balance in notes. As the contract required, the decedent deposited with an escrow agent his stock certificate assigned in blank, and Associated deposited the $500,000 down payment with the agent. The sale contract contained usual provisions relating to warranty of title to the underlying assets of the corporation, adjustment of the price based upon a final audit, liquidated damages to the seller in event of default by the purchaser, right in the purchaser to cancel in event of default by the seller, and right in either party to cancel in case of destruction of the hotel property by casualty. The closing date, originally January 3, 1961, was subsequently extended to March 1, 1961. The decedent died on January 30, 1961. With some minor adjustments, the decedent's executor and Associated consummated the sale in February 1961. (Pet. App. A8-14).

The price exceeded the decedent's adjusted basis for the stock by $3,454,863. This amount was not reported as gain in either the income tax return filed on behalf of the decedent for the taxable period ending with his death, or in the estate's income tax return, or in the returns filed by the beneficiaries of the estate. The Commissioner determined that the gain constituted "income in respect of a decedent" taxable to the estate under Section 691(a)(1)(A) of the Internal Revenue Code 1954 (Pet. App. A15). In a suit

for refund of the resulting deficiency, the executor claimed a stepped-up basis on the theory that the estate acquired the stock from the decedent and then sold it to Associated. The district court sustained the Commissioner's determination (Pet. App. A16-A28). The court of appeals affirmed (Pet. App. A1-A5).

The decision is correct. No conflict exists, nor is any asserted; and there is no other reason for further review.

1. Section 691(a)(1)(A) of the 1954 Code provides that the "amount of all items of gross income in respect of a decedent" not includible in the taxable period ending with his death are includible in the gross income of his estate for the taxable year when received "if the right to receive the amount is acquired by the decedent's estate from the decedent".[1] The executor's "right to receive" the sale price stemmed from the decedent's execution of the sale contract.[2] But for the decedent's ownership of the stock and agreement to sell it, the executor's right to collect the contract price would never have arisen. As the court below observed (App. A5), the "contract created a right to these proceeds in Mr. Dinkler at the time the contract was executed", which "inured to and was binding upon his executor"; and while some

---

[1] Section 1014(c) denies a stepped up basis to "property which constitutes a right to receive an item of income in respect of a decedent under section 691".

[2] Although the result would be the same whether the decedent or his executor made delivery of the stock, in this case the decedent also delivered the stock certificate, assigned in blank, to the escrow agent (Pet. App. A1).

acts remained to be performed by his executor, "these were not of such scope as would negate the right which was his under the contract".[3]

2. Petitioners' contention (Pet. 7-9) that the "right to receive" test embodied in 1954 Code Section 691 is tantamount to the narrow "accrued" income test contained in Section 42 of the Revenue Act of 1934 ignores the fact that the predecessor of the provision involved here was Section 126 of the 1939 Code, added by the Revenue Act of 1942.[4] Prior to 1934 income that had accrued to a decedent reporting on the cash basis escaped income taxation if it had not been collected during his lifetime.[5] To plug this loophole, Congress enacted Section 42 of the Revenue Act of 1934, which required accrued income of a decedent to be included in his last return.[6] This provision sometimes produced hardship by bunching in the decedent's last return income collectible over a period of several years, thus subjecting it to higher tax rates.

---

[3] Although the court of appeals considered the test applied by the district court ("whether the post death payments are in fact due to the services performed by or the economic activities of the decedent") as somewhat broad, it held that the district court "reached the correct result", and that its decision "in effect, is based on the right to income test; it simply was not articulated as such". (Pet. App. A2, 4).

[4] For a history of the provisions governing income in respect of a decedent see *e.g.*, *Davison's Estate* v. *United States*, 292 F. 2d 937 (Ct. Cl.); *Richardson* v. *United States*, 294 F. 2d 593 (C.A. 6), certiorari denied, 369 U.S. 802.

[5] See *Helvering* v. *Enright*, 312 U.S. 636; *Nichols* v. *United States*, 64 Ct. Cl. 241, certiorari denied, 277 U.S. 584.

[6] See *Estate of Putnam*, 324 U.S. 393.

Accordingly, the 1942 Act added Section 126 to the 1939 Code substituting for the "accrual" concept embodied in the prior law the broader "right to receive" criterion, and requiring the income to be reported when collected by the person who acquired from the decedent the right to receive it. The result was to (H. Rep. No. 2333, 77th Cong., 2d Sess. 83 (1942)):[7]

> change * * * existing law by providing that such amounts shall not be included in the decedent's income but shall be treated, in the hands of the persons receiving them, as *income of the same nature and to the same extent as such amounts would be income if the decedent remained alive and received such amounts.* [Emphasis added.]

3. In harmony with the language and history of 1954 Code Section 691, the Treasury Regulations make it plain that the phrase "right to receive" is not to be assimilated to income "accrued" in the technical accounting sense, but refers to income to which the decedent would have been entitled had he remained alive and received it. See Regulations Section 1.691 (a) under the 1954 Code.[8] Indeed, the Regulations expressly provide that "income in respect of a dece-

---

[7] See also *Commissioner* v. *Linde,* 213 F. 2d 1 (C.A. 9), certiorari denied, 348 U.S. 871; *Davison's Estate, supra.* Petitioner's quotation from Mertens (Pet. 8) regarding "prior law" has reference to 1939 Code Section 126 (added by the 1942 Act), which was substantially the same as 1954 Code Section 691 here involved, not (as petitioners imply) to Section 42 of the 1934 Act, which differed from both.

[8] The Regulations were adopted October 7, 1957. T.D. 6257, 1957-2 Cum. Bull. 342.

dent", as that term is used in Section 691, embraces "[i]ncome to which the decedent had a contingent claim at the time of his death" (Section 1.691(a)-1(b)(3))—a far more comprehensive standard than that determinative of when income "accrues" under orthodox accrual accounting principles.[9]

4. The courts have uniformly held that Section 691 (and Section 126 of the 1939 Code) applies not only to amounts owing to the decedent at the time of his death, but also to amounts which would have been income to him had he lived to collect them. *Commissioner* v. *Linde*, 213 F.2d 1 (C.A. 9), certiorari denied, 348 U.S. 871; *Davison's Estate* v. *United States*, 292 F.2d 937 (Ct. Cl.); *Riegelman's Estate* v. *Commissioner*, 253 F.2d 315 (C.A. 2); *O'Daniel's Estate* v. *Commissioner*, 173 F.2d 966 (C.A. 2); *Bausch's Estate* v. *Commissioner*, 186 F.2d 313 (C.A. 2); *Keck* v. *Commissioner*, 49 T.C. 313; *Bernard* v. *United States*, 215 F.Supp. 256 (S.D.N.Y.). In some of these cases (*e.g.*, *Linde*, *Davison*, *Keck*, *Riegelman*, *Bernard*) conditions pre-

---

[9] Example (4) in the Regulations (Section 1.691(a)-2(b)), upon which petitioner relies (Pet. 11), is inapposite here since it poses a case where the decedent "agreed that his executor would sell" his stock and the shares were "sold by [the] executor". Here the decedent did the selling and the situation falls within the last sentence of the example ("If, in this example, A had in fact sold the stock during his lifetime but payment had not been received before his death, any gain on the sale would constitute income in respect of a decedent when the proceeds were received.")

Nor does example (5)(1) aid the petitioners; it poses only a case where the decedent had "entered into negotiations to sell * * * but did not complete the sale before his death". Compare example (5)(2).

cedent to payment remained to be performed and no specific sum was owing to the decedent at his death. In others (*e.g., O'Daniels*), the decedent did not even have a legally enforceable right to the payment, which was deemed income with respect to the decedent because they were (173 F.2d at 968) "expectancies which later bore fruit." [10]

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

MITCHELL ROGOVIN,
Assistant Attorney General.

HARRY BAUM,
WILLIAM A. FRIEDLANDER,
Attorneys.

JULY, 1968.

---

[10] Neither *Eisner* v. *Macomber*, 252 U.S. 189, nor *Lucas* v. *North Texas Co.*, 281 U.S. 11, cited by petitioners (Pet. 12-13), has anything to do with income in respect of a decedent. *Macomber* held that a common stock dividend in proportion to common stock holdings did not result in a realization of gain to the stockholders because there was no severance of income from capital; here gain was plainly realized in the amount of the difference between the sale price and the basis of the stock. *North Texas* held only that gain on a sale of property should be reported in the year of the sale, and not in the earlier year when the buyer informed the seller that an option would be exercised.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1968 312767 5